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No. 86-1807

In the Supreme Court of the United States

OCTOBER TERM, 1987

FRANK LEOGRANDE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the court of appeals erred in upholding the IRS's assessment of the $500 "frivolous return" penalty under Section 6702 of the Internal Revenue Code[1] for filing a Form 1040 containing a statement of constitutional objection, rather than financial information.

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

1. Each petitioner filed a Form 1040 for the 1983 tax year which provided only his name, address, social security number, and the amount of estimated taxes paid or amount applied from the 1982 return (line 58). All the remaining line items, except one, were left blank. The space provided for "miscellaneous income" contained the words "Fifth and Sixth Amendments to Constitution." The purported returns thus contained no financial information regarding income or deductions from which tax liability could be computed, nor did they specify any asserted tax liability. The purported returns, including the statement of constitutional objection, were not signed under penalty of perjury, nor verified in any other manner. Pet. App. 2a.

The Internal Revenue Service determined that petitioners' purported returns fell within the scope of the "frivolous return" penalty provision of Section 6702 of the Code and assessed the $500 penalty against each taxpayer. Pursuant to Section 6703(c) of the Code, each petitioner paid 15% of the penalty ($75) and filed an administrative claim for refund. Following the Commissioner's denial of those refund claims, petitioners brought the instant refund suits, which were consolidated in the United States District Court for the Eastern District of New York. Pet. App. 3a.

The government moved for summary judgment, and petitioners filed a response in which they attempted to justify their invocation of the Fifth Amendment privilege on their tax returns by asserting that they either had been charged with or were under investigation for certain crimes (see C.A. App. 160-161; Pet. 3). After a hearing, the district court granted the government's motion for summary judg-

ment and awarded costs and attorneys' fees to the government (Pet. App. 6a-8a). The court explained in rejecting petitioners' arguments that they "neither completed the neutral questions of the tax return nor indicated on the return the basis for their constitutional objections" (*id.* at 7a-8a).

The court of appeals unanimously affirmed in a per curiam decision (Pet. App. 1a-5a; 811 F.2d 147). The court noted that "[i]t has long been settled * * * that a taxpayer cannot refuse to provide any financial information on a tax return based upon a blanket assertion of the Fifth Amendment privilege" (Pet. App. 3a). In light of the long line of cases rejecting petitioners' contentions, the court of appeals concluded that petitioners' appeal was frivolous and awarded the government double costs and a reasonable attorney's fee in a total amount of $3,000, to be paid one-half by petitioners and one-half by their attorney. Pet. App. 4a-5a; see Fed. R. App. P. 38.

2. Section 6702(a) of the Code provides for the imposition of a $500 penalty upon an individual who files an income tax return or purported return that fails to "contain information on which the substantial correctness of the self-assessment may be judged" if such conduct is due to "a position which is frivolous * * *." Here, petitioners basically left their Forms 1040 blank, except for identifying information, purporting to raise a constitutional privilege with respect to one line item. Moreover, petitioners did not sign or verify the purported returns, as required by Section 6065 and by Form 1040 itself, nor did petitioners explain or verify their assertion of constitutional privilege. See *Borgeson* v. *United States*, 757 F.2d 1071 (10th Cir. 1985). As the court of appeals explained (Pet. App. 3a-4a), the legisla-

tive history of Section 6702 makes clear that the "frivolous return" penalty was meant to apply to returns "in which many or all of the line items are not filled in except for reference to spurious constitutional objections." S. Rep. 97-494, 97th Cong., 2d Sess. 278 (1982). Thus, petitioners' Forms 1040 plainly fell within the ambit of Section 6702, and the IRS's imposition of the "frivolous return" penalty was amply justified.

Petitioners' assertion of constitutional privilege on their purported returns does not alter this result. Consistent with decisions of this Court,[2] the courts of appeals have uniformly rejected the notion that a taxpayer may refuse to provide any financial information at all on a tax return by blanket assertion of a Fifth Amendment privilege.[3] Petitioners assert (Pet. 8) that this rule is inconsistent with a statement in *United States* v. *Barnes*, 604 F.2d 121, 148 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980), suggesting that a taxpayer may claim the Fifth Amendment privilege with respect to the *amount* of

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[2] See, *e.g.*, *Garner* v. *United States*, 424 U.S. 648, 651 (1976); *Albertson* v. *SACB*, 382 U.S. 70, 79 (1965); *United States* v. *Sullivan*, 274 U.S. 259, 263-264 (1927).

[3] See, *e.g.*, *Eicher* v. *United States*, 774 F.2d 27, 29 (1st Cir. 1985); *United States* v. *Schiff*, 612 F.2d 73, 77, 83 (2d Cir. 1979); *United States* v. *Edelson*, 604 F.2d 232, 234-235 (3d Cir. 1979); *Moore* v. *Commissioner*, 722 F.2d 193, 195 (5th Cir. 1984); *United States* v. *Heise*, 709 F.2d 449, 451 (6th Cir.), cert. denied, 464 U.S. 918 (1983); *United States* v. *Verkuilen*, 690 F.2d 648, 654 (7th Cir. 1982); *Ueckert* v. *Commissioner*, 721 F.2d 248, 250 (8th Cir. 1983); *United States* v. *Neff*, 615 F.2d 1235, 1239 (9th Cir.), cert. denied, 447 U.S. 925 (1980); *United States* v. *Brown*, 600 F.2d 248, 251-252 (10th Cir.), cert. denied, 444 U.S. 917 (1979); *Ricket* v. *United States*, 773 F.2d 1214 (11th Cir. 1985).

his income. This statement is dictum that has never been followed by any court of appeals. And, of course, to the extent that petitioners view this dictum and the decision below as creating some tension within the Second Circuit, that presents no occasion for review by this Court; rather, petitioners more appropriately should have sought rehearing en banc to address the *Barnes* dictum.

In any event, petitioners obviously have not made a sufficient showing to justify any invocation of the privilege in connection with their tax returns, much less a blanket refusal to supply any financial information at all. The bare fact that there are criminal proceedings pending against a claimant is not enough to invoke the privilege; there must be a nexus between the risk of conviction and the information requested. See *Martin-Trigona* v. *Gouletas*, 634 F.2d 354, 360 (7th Cir.), cert. denied, 449 U.S. 1025 (1980). Here, petitioners' representation that they were accused or suspected of crimes (see Pet. 3) failed to demonstrate that properly completing a tax return would have posed a substantial danger of self-incrimination.[4]

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[4] Petitioners suggest (Pet. 12) that they had inadequate opportunity to justify their assertion of the Fifth Amendment privilege because the district court improperly refused to conduct an *in camera* hearing. This contention was only barely alluded to by petitioners in the court of appeals (see Pet. C.A. Br. 15), and it was not addressed by that court; the contention is thus not appropriate for consideration by this Court. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927). In any event, the contention is wholly without merit. Petitioners had ample opportunity in the district court to justify their assertion of privilege by means of affidavits and their briefs and argument on the government's motion for

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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summary judgment. They failed to do so. The fact of the matter is that there is no conceivable justification for leaving almost the entire Form 1040 blank, without even claiming a privilege as to all but one of the items left blank. See *United States* v. *Sullivan, supra.* An *in camera* hearing could not have helped petitioners. Indeed, the Eleventh Circuit has specifically held that an *in camera* hearing is not necessary to determine the validity of a return on which a taxpayer asserts a blanket claim of privilege against self-incrimination. *United States* v. *Vance,* 730 F.2d 736, 737-738 (11th Cir. 1984).

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